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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CONTINENTAL OIL COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT CONTINENTAL OIL COMPANY IN OPPOSITION

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BRIEF OF RESPONDENT CONTINENTAL OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below and Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 350 F. 2d 689 and is also reprinted as Appendix A to the petition of United Gas Pipe Line Company (United). The jurisdiction of this Court is stated in United's Petition For A Writ Of *Certiorari.*

Counterstatement of Question Presented

This case presents essentially the following question, which we submit the Commission and the court below have correctly answered in the negative:

> Can United lawfully cease purchasing and taking natural gas which Continental is required to continue to sell under the Natural Gas Act, and thus abandon

the facilities by which it takes such gas or the service rendered by means thereof without first securing, after hearing, the Commission's permission and approval for such abandonment?

Statute Involved

The pertinent provisions of the Natural Gas Act are set out in Appendix D of United's Petition For A Writ Of *Certiorari*.

Counterstatement of the Case

The facts of this case are largely undisputed. However, some counterstatement is appropriate. In January 1953 Respondent Continental Oil Company (Continental) and United contracted for the sale and purchase of gas produced by Continental from the Johnson Bayou Field, Louisiana. This contract provided a primary term of ten years, with provision for termination thereafter upon notice of either party. Continental obtained a certificate of public convenience and necessity from Respondent Federal Power Commission (Commission) authorizing the sale of gas to United in accordance with its filed rate schedule, the substance of which was contained in the contract. United also obtained a certificate from the Commission authorizing construction of facilities necessary to take the gas from Continental, and deliveries consequently commenced on January 31, 1955.

Upon expiration of the primary term of the contract, Continental and United were unable to agree upon a new contract. Continental thereupon elected to terminate the contract in accordance with its provisions. However, neither Continental nor United sought abandonment or termination of their respective certificates granted by the Commission, and Continental did not seek to withdraw its rate schedule

which had been accepted by the Commission. Instead, Continental filed a unilateral rate increase to the area guideline level announced by the Commission in its Statement of General Policy No. 61-1. The Commission accepted this unilateral rate increase as Continental's lawful and effective rate under its rate schedule. United sought rehearing of the Commission's order accepting Continental's unilateral rate increase, but did not seek judicial review of the Commission's order denying United's application for rehearing. Thus, the unilateral rate increase became final and constitutes Continental's lawful rate for the sale of gas to United from the Johnson Bayou Field. Therefore, neither the rate nor Continental's right to unilaterally file the rate are at issue.

Disregarding Continental's demand to continue to take gas from the Johnson Bayou Field in accordance with Continental's effective rate schedule, United, acting on its own and without permission of the Commission, ceased taking Continental's gas on January 31, 1963, and did not resume taking such gas until subsequently compelled to do so by order of the Commission in Opinion No. 426 issued May 5, 1964. The court below, upon review of Opinion 426 and Opinion 426-A, which denied United's application for rehearing of Opinion 426, affirmed the Commission's action in requiring United to resume taking gas from Continental at the Johnson Bayou Field. The Commission and the court below stated that United's relief must be by application to abandon, and Commission permission to so abandon pursuant to Section 7(b) of the Natural Gas Act, 15 USC Sec. 717f(b).

Reasons for Denying the Petition for Writ of Certiorari

Continental respectfully submits that the decision of the court below affirming the opinion of the Commission is correct, and that United submits no grounds for this Court to entertain review of that court's decision. While this is a case of first impression, the principles involved in this case are not novel. This case presents simply the corollary, applied to a pipeline purchaser, of the principles previously decided by this Court in application to a producer seller in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 364 U.S. 137 (1960). In the *Sunray* case this Court established the principle that a producer selling gas under a certificate of public convenience and necessity cannot cease such sale and delivery of gas upon termination of the contract between producer and pipeline without first obtaining permission of the Commission pursuant to Section 7(b) of the Natural Gas Act to abandon such sale and delivery. The Court there recognized that the public interest required continuation of the service initiated by the certificated sale.

This public interest in continuation of a sale and service overrides the private interest of either producer or pipeline as reflected by their private contractual arrangements. In the case below, the Court of Appeals for the Fifth Circuit has properly recognized that this principle is not a one-way street to benefit pipelines and penalize producers, but a broad avenue of regulation establishing the Commission's jurisdiction over producers and pipelines alike to compel continuation of sales and services once commenced unless and until the Commission properly determines that the public interest permits abandonment.

Contrary to United's assertion, the Natural Gas Act necessarily regulates purchases of natural gas by pipelines, since such purchasing is inseparable from the sale of natural gas by producers. The Commission's jurisdiction to regulate the sale of natural gas must encompass the entire relationship of sale and purchase between producer and pipeline. Any other result would leave a regulatory gap by which pipelines rather than the Commission would dictate when the public will receive gas and when the public will not receive gas. The Natural Gas Act cannot be construed to permit a buyer to reject without Commission approval a sale of gas once initiated with Commission approval any more than it could be construed to permit a seller to cease selling without Commission approval. This must be true both during and after the term of the gas sales contract. United accepted the Commission's continuing jurisdiction over the sale and delivery, purchase and taking of gas when United installed certificated purchase facilities and commenced taking such gas through such facilities.

The decision of the court below is not contrary to the principles set out in the *Sunray* case. Rather, this decision is complementary to the *Sunray* decision in recognizing the applicability of the regulatory principles first stated in *Sunray* to both pipeline and producer. This case simply achieves equality for producers and pipelines under the regulatory scheme accepted by this Court in *Sunray*. United merely points to certain dicta in the *Sunray* case, taken out of context, to support its contention that there is a conflict between this case and *Sunray*. However, the dicta in *Sunray* must be read in the context of the facts of *Sunray*. In that case the Court was concerned with a producer who claimed the right to terminate a sale upon expiration of the contract period. There was no issue there of the buyer's contending that the Commission's jurisdiction did not attach to con-

tinued purchase and taking of gas. The rationale of this Court in the *Sunray* case applies as much to the pipeline as to the producer, since the concept of "service" there dealt with by the Court was one of service to the consuming public.

Finally, United's argument that the Natural Gas Act is unconstitutional to the extent it would permit the Commission to compel a pipeline to take gas in conjunction with a regulated sale must fall for lack of merit. The constitutional implications of this question were evident in the *Sunray* case. There is nothing novel in United's basic contentions which would now permit a meritorious argument of unconstitutionality.

Conclusion

For the foregoing reasons, this Court should not grant the petition for writ of *certiorari*.

Respectfully submitted,

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